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IN THE

Supreme Court of the United States

October Term, 1957

No. 378

JAMES J. MATLES,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed an order of the United States District Court for the Eastern District of New York, holding petitioner in contempt.

Opinions Below

The opinion of the trial court denying petitioner's pre-trial motion is reported at 115 F. Supp. 261 (D. C., E. D. N. Y.) and 19 F. R. D. 319 (D. C., E. D. N. Y.). The order of the trial court holding petitioner in contempt appears at R. 122.* The opinion of the court below

* We thus refer to the joint appendix below.

affirming the contempt conviction is unreported and attached hereto (App. 20 *et seq.*).*

Jurisdiction

The judgment of the Court of Appeals was entered on June 10, 1957, and a petition for rehearing was denied on July 5, 1957. By order of Mr. Justice Harlan, the time for filing a petition for certiorari was extended to August 20, 1957. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C. 1254.

Statement of the Case

The order of contempt here involved was made by District Judge Matthew T. Abruzzo, entered in the District Court for the Eastern District of New York on November 26, 1956 (R. 122), and arose out of an action instituted on December 16, 1952, under Section 338(a) of the Nationality Act of 1940, Title 8, U. S. C., Section 738(a), to vacate, cancel and set aside on "disloyalty" grounds a certificate and order of naturalization granted to the defendant in 1934. The action was instituted by the filing of a verified complaint but lacked an affidavit showing good cause as required by Section 338(a) of the Nationality Act of 1940 (R. 38-43).

On May 15, 1953, petitioner sought dismissal of the complaint upon the grounds, among others, that the court lacked jurisdiction over the action in that the complaint as filed was not supported by the required affidavit showing good cause (R. 56). Thereafter, on September 16, 1953,

* We thus refer to the appendix to this petition which contains the opinion and judgment herein as well as the unreported opinion of the court below in a related case.

the government filed an amended complaint and attached thereto as Exhibit A, an affidavit of one Reuben Speiser (R. 44, 50). Petitioner urged in support of his motion to dismiss that the court lacked jurisdiction of the action both because the complaint was not *instituted* upon an affidavit showing good cause therefor and because, even if the affidavit had been filed at the institution of the action, it was insufficient.

Petitioner's motion was denied in all respects by Judge Clarence G. Galston on October 6, 1953, 115 F. Supp. 261. Thereafter, the Court decided *United States* v. *Zucca*, 351 U. S. 91, affirming the decision of the court below, 221 F. 2d 805. On July 3, 1956, Judge Inch, Chief Judge of the district court, in *United States* v. *Lucchese*, Civil No. 13052, granted a motion to reargue a previously denied motion to dismiss a complaint and ordered the complaint dismissed upon the authority of the *Zucca* case (R. 76).

Although Judge Inch, prior to the decision of the Court in *Zucca*, permitted the government to amend by filing an affidavit, he felt constrained on reargument to grant a motion to dismiss on the ground that this Court had held in *Zucca* that the affidavit of good cause was a "procedural prerequisite to the initiation and maintenance of the proceeding." Petitioner, thereupon, on the authority of the *Zucca* and *Lucchese* cases filed a motion for leave to reargue its motion to dismiss and for an order dismissing the complaint (R. 67). The motion was denied by Judge Galston on August 14, 1956, without opinion (R. 77).

Judge Galston at the same time denied a motion to vacate the notice of examination of petitioner before trial based upon the jurisdictional contentions adverted to above as well as upon the contention that petitioner could not, consistent with the Fifth Amendment, be compelled to testify against himself (R. 77). Thereafter, on September 19, 1956, Judge Rayfiel ordered petitioner's deposition to proceed on September 24, 1956 (R. 91).

On October 15, 1956, petitioner appeared for the taking of his pre-trial deposition but refused to be sworn on the jurisdictional and constitutional grounds described above (R. 22 *et seq.*). On October 22, 1956, he appeared before Judge Abruzzo who ordered him to be sworn (R. 27) and on November 20, 1956, he was sentenced to three months in jail for his refusal to be sworn. The sentence was stayed pending appeal (R. 37).

In rejecting the contention that the affidavit of good cause is a jurisdictional prerequisite to the initiation of a denaturalization proceeding, the court below recognized that, after the Court's decision in *Zucca*, the issue had "been much mooted by district judges" (App. 24).*

In finding the Speiser affidavit sufficient, the court relied on the reading of *Zucca* set forth in *Nowak* v. *United States*, 238 F. 2d 282 (C. A. 6), certiorari granted 353 U. S. 922. Finally, although the court concluded that "denaturalization proceedings are not sufficiently criminal in their nature to entitle a defendant to refuse to take the stand" (App. 27), Chief Judge Clark, who wrote the opinion, expressed doubts concerning this view and stated that (App. 28), "this important issue must of course await final settlement by the Supreme Court."

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* On June 17, 1957, the court below reversed the district court's order dismissing the complaint in *United States* v. *Lucchese*, *supra*, on the authority of the instant case (App. 33 *et seq.*). Judge Stewart in a separate opinion expressed the view that *Zucca* unambiguously requires the filing of the affidavit at the time of the initiation of the action but concurred only because of the controlling decision in this case. We have been informed by counsel that review of the lower court's decision in *Lucchese* will be sought in this Court.

On June 27, 1957, a district court ordered the dismissal of two complaints on the ground that affidavits of good cause had not been timely filed. *United States* v. *Clara Paulson*, No. 3838 and *United States* v. *Gunnar Paulson*, No. 3839 (D. C. W. D., Wash. N. D.).

Questions Presented

1. Whether a defendant in a denaturalization proceeding can be compelled, in an oral deposition before trial, to be a witness against himself and to furnish the evidence to be used to denaturalize him.

2. Whether an affidavit of good cause is a jurisdictional prerequisite to the initiation of a denaturalization proceeding.

3. Whether an affidavit by an attorney of the Immigration and Naturalization Service, based upon a review of the Service's files and reiterating the conclusions of the complaint, but wholly lacking in evidentiary matters, is sufficient to meet the "good cause" requirement under *United States* v. *Zucca*, 351 U. S. 91.

Statutes Involved

This proceeding is brought under 8 U. S. C. Section 738(a), formerly Section 338(a) of the Nationality Act of 1940 and now contained in 8 U. S. C. Section 1451(a), which provides:

> "It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of Section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured."

Section 738(b), formerly Section 338(b) of the Nationality Act of 1940 and now incorporated in 8 U. S. C. Section 1451(b) provides:

> "The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days and personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought."

Section 15 of the Act of June 29, 1906 (34 Stat. 596, 601) provides:

> "That it shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and cancelling the certificate of citizenship on the grounds of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the state or the place where such suit is brought."

REASONS FOR GRANTING THE WRIT

The Applicability of the Self-Incrimination Privilege to Denaturalization Proceedings

1. As we have seen, *supra*, the opinion of the court below acknowledges that our contention that petitioner could not be forced to assist the government in denaturalizing him raises an important issue which must be authoritatively settled here.

2. In *United States* v. *Minker*, 350 U. S. 179, 190, the Court left open the question, substantially like the one presented here, "whether Congress may empower an immigration officer to secure evidence, under the authority of a subpoena, from a citizen who is himself the subject of an investigation directed toward his denaturalization." But the Court recognized that the severity of the sanction of denaturalization—even though threatened *in limine*—was relevant to a construction of the statute. And in his concurring opinion (at 197) Mr. Justice Douglas stated that constitutional guarantees would be imperiled by compelling a citizen to "be a witness against himself and furnish out of his own mouth the evidence used to denaturalize him."

3. The privilege against self-incrimination protects a defendant in a "criminal case"—and not merely in a "criminal prosecution" as under the Sixth Amendment's guarantee of a jury trial—against being compelled to take the stand. This inclusive term has not been limited to prosecutions. As recently as *Ullmann* v. *United States*, 350 U. S. 422, in deciding the extent to which the privilege against self-incrimination was displaced by the Immunity Act of 1954, the Court said (at 431), "since the Immunity Act protects a witness who is compelled to answer to the extent of his constitutional immunity, he has, of course, when a particular sanction is sought to be imposed against him, the right to claim that it is *criminal in nature*." (Emphasis added.)

4. Although the defining formula has varied, it has been consistently recognized that the privilege against self-incrimination protects a defendant against testimonial compulsion in proceedings which, though civil in form, embrace criminal elements. Thus, in *Boyd* v. *United States*, 116 U. S. 616, 634, a case which this Court has expressly refused to limit or qualify, *Ullmann* v. *United States*, *supra*, at 439, the Court said:

> "As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this *quasi* criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself * * *."

Following the *Boyd* doctrine, the Court, in a civil action to recover a penalty for illegal importation of contract labor, said:

> "This, though an action civil in form, is unquestionably criminal in its nature, and in such a case the defendant cannot be compelled to be a witness against himself. * * * [citing *Boyd* v. *United States*, 116 U. S. 616] * * * within the rule there laid down, it was error to compel this defendant to give testimony in behalf of the government." *Lees* v. *United States*, 150 U. S. 476, 480.*

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*This rule has been followed in the lower courts in suits to recover penalties under the Wool Products Labeling Act, *United States* v. *Fishman*, 15 F. R. D. 125 (D. C. N. Y.) and in actions for penalties for violation of price control regulations. *Bowles* v. *Dweck*, 7 F. R. S. 33.335, Case 1 (D. C. N. Y.).

In other civil actions where the main thrust of the complaint is criminal in nature, the courts have upheld the right of the defendant to refuse to take the stand at all. See *Hope* v. *Burns*, 6 F. R. D. 556 (D. C. Ky.); *National Discount Corp.* v. *Holzbaugh*, 13 F. R. D. 236 (D. C. Mich.); *In re Green*, 86 Mo. App. 216; and *State* v. *Smith*, 56 S. D. 238, 228 N. W. 240, 250.

5. This Court has recognized that the deprivation of a status far less important than citizenship is so penal in character as to justify the application of *ex post facto* and bill of attainder prohibitions * —constitutional guarantees deemed by some to be more rigid in their insistence upon punishment historically called criminal than the privilege against-incrimination.** And it has made it unambiguously clear that the severity of the denaturalization sanction—rather than the formal classification attached to the proceeding—is of decisive relevance in determining the nature and scope of the citizen's rights. *Schneiderman* v. *United States*, 320 U. S. 118, 160; *Knauer* v. *United States*, 328 U. S. 654, 659; *United States* v. *Minker*, *supra*, at 187-188.†

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* *Ex parte Garland*, 4 Wall. 333, and *Cummings* v. *Missouri*, 4 Wall. 277. To be sure, in *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 594-595, the Court refused to apply the reasoning of these cases to the sanction of deportation. See also *Marcello* v. *Bonds*, 349 U. S. 302; *Lehmann* v. *United States ex rel. Carson*, 353 U. S. ..., 77 S. Ct. 1022, and *Mulcahey* v. *Catalanotte*, 353 U. S. ..., 77 S. Ct. 1025. But the rationale of *Harisiades* rests upon an alleged plenary (and *sui generis*) power of Congress over aliens. The court below, therefore, missed the mark when it compared (App. 28) the deportation of aliens with the denaturalization of citizens. See, for example, *Ng Fung Ho* v. *White*, 259 U. S. 276, 284-285. An important reason for granting the writ is to make clear that it was never intended that *Harisiades* be expanded by analogy to other areas. Indeed, this Court in *Jordan* v. *DeGeorge*, 341 U. S. 223, 231, applied to a deportation proceeding the "void for vagueness" doctrine, normally confined to criminal cases, "in view of the grave nature of deportation."

** A complete discussion appears in Chafee, *Three Human Rights in the Constitution* (1956), "The Prohibition of Bills of Attainder," pp. 90-161.

† The lower court in *Minker* (217 F. 2d 350, 352-353 (C. A. 3)) thus distilled this Court's treatment of denaturalization: "Technically, we are not administering the criminal law in this case. But we are concerned with the administration of a sanction which in effect is gravely penal. A fine or imprisonment is the normal criminal penalty. But loss of citizenship is a far graver penalty than most fines and many prison sentences." And see Judge Palmieri's observation in *Zucca*, 125 F. Supp. 551, 556 (D. C. S. D. N. Y.).

6. The punitive impact of denaturalization has resulted in a series of authoritative determinations assimilating the denaturalization proceeding to a criminal case. Thus:

(a) The burden of proof for denaturalization approximates the burden demanded for conviction in a criminal case. *Schneiderman* v. *United States*, 320 U. S. 118, 125; *Baumgartner* v. *United States*, 322 U. S. 665, 670; *Gonzales* v. *Landon*, 350 U. S. 920; cf. *Yates* v. *United States*, 353 U. S. .., 77 S. Ct. 1064.

(b) The government has been "limited, as in a criminal proceeding, to the matters charged in its complaint." *Schneiderman* v. *United States*, *supra*, at 160.

(c) Default judgments, routinely granted in ordinary civil actions, are set aside in denaturalization proceedings because "denaturalization consequences may be more grave than consequences that flow from conviction for crimes. Persons charged with crime in United States courts cannot be convicted on default judgments unsupported by proof." *Klapprott* v. *United States*, 335 U. S. 601, 611. Nor is the normal sanction of default under Rule 37(b) of the Federal Rules of Civil Procedure for refusal to answer questions in depositions applied in denaturalization proceedings. Because "a naturalization judgment involves interests of a different order from those involved in other civil proceedings," decisions "dealing with ordinary civil cases are not controlling here." *United States* v. *Costello*, 16 F. R. D. 428, 430 (D. C. N. Y.).

(d) Even in the initial stages of a denaturalization proceeding the government has been held to the strictest procedural requirements.

"The mere filing of a proceeding for denaturalization results in serious consequences to a defendant.

Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause." *United States* v. *Zucca*, *supra*, at 99-100.

(e) The rule of strict construction of penal statutes applies to denaturalization statutes; "where there is doubt it must be resolved in the citizen's favor." *United States* v. *Minker*, *supra*, at 187-188. Indeed, this rule was applied in *Minker* to distinguish between an ordinary witness and a defendant—the very distinction here in issue.

7. It would be irrational to exclude the privilege against self-incrimination alone from the protections surrounding the defendant in a denaturalization proceeding, because:

(a) To treat the defendant in a denaturalization case as the accused for purposes of the privilege against self-incrimination gives coherence to a well-established body of protections in this area. Cf. *United States* v. *Minker*, *supra*, at 188.

(b) This Court has repeatedly insisted that the privilege must be given a liberal application to guard fully against the evils it was designed to prevent.*

(c) This denaturalization proceeding involves questions concerning petitioner's political attachment and

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* See, for example, *Quinn* v. *United States*, 349 U. S. 155; *Emspak* v. *United States*, 349 U. S. 190; *Blau* v. *United States*, 340 U. S. 159; *Hoffman* v. *United States*, 341 U. S. 479; *United States* v. *White*, 322 U. S. 694, 698; *Feldman* v. *United States*, 322 U. S. 487, 489; *Slochower* v. *Board of Higher Education*, 350 U. S. 551, 557, and *Ullmann* v. *United States*, *supra*.

affiliation (R 44, 101). The historical background of the privilege and the pattern of its development—of crucial relevance in determining the scope of the privilege*—establish that it was designed to protect against compulsory disclosure of political belief and affiliation. *Quinn* v. *United States*, *supra*, at 160-161; *United States* v. *St. Pierre*, 132 F. 2d 837 (C. A. 2).

(d) The fraud and perjury charged here are familiar forms of criminal conduct. Indeed, were it not for the bar of the statute of limitations, this proceeding could in all likelihood have taken the form of an indictment. See, for example, *Bridges* v. *United States*, 346 U. S. 209, and *United States* v. *Obermeier*, 186 F. 2d 243 (C. A. 2). And, in addition, this proceeding is closely linked not only to deportation but to prosecution under the Smith Act. Title 18, U. S. C., Section 2385.

> "Denaturalization * * * particularly when employed against 'disloyal' naturalized citizens has all the earmarks of a criminal suit." Roche, *Statutory Denaturalization, 1906-1951*, 13 U. of Pittsburgh L. R. 276, 279 (1952).**

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* See, for example, *Ullmann* v. *United States*, *supra*, at 438.

** To the same effect: Black, *Disloyalty and Denaturalization*, 29 Kentucky L. J. 153 (1941); Van Vleck, *Administrative Control of Aliens* (1932), pp. 219-224; Note: *Cancellation of Citizenship Because of Communism*, 51 Yale L. J. 1215, 1220 (1942).

The trial court, in our view, was greatly influenced by the notion that in a denaturalization case based upon grounds of disloyalty, the government should enjoy the same protection against pre-trial disclosures as in a criminal case. Thus, Judge Galston, in upholding the government's objections to petitioner's interrogatories seeking the names and addresses of the government's informer witnesses, ruled (R. 101) that "In ordinary circumstances the right of the defendant to serve interrogatories within the framework of Rule 33 would not be challenged. But heed must be given to the particular nature of this action."

When petitioner, frustrated in his attempt to secure some inkling of the government's case through discovery by pre-trial examination of plaintiff's witnesses, sought to examine four well-known informers

8. Among the considerations which persuaded the court below to the view that "denaturalization proceedings are not sufficiently criminal in their nature to entitle a defendant to refuse to take the stand" is "the fact that little prejudice attaches to the defendant's refusal to answer specific questions because denaturalization cases are tried by the court, and not to juries." (App. 27). But if the sanction in this denaturalization proceeding could justify the invocation of the privilege after petitioner took the witness stand, then he obviously was not required to be a witness at all. On the other hand, we cannot understand how the fact that petitioner might as a witness validly claim the privilege by reason of fear of some other sanction could persuade the court that the penalty in this case was insufficient to justify petitioner's refusal to take the stand.

9. Nor could the insulation of petitioner from prejudicial inference by reason of the non-jury character of the proceeding diminish his right as an accused not to take the stand. And even if petitioner's plea of the privilege could generate no hostile inference in an ordinary non-jury case, we are dealing here with matters of affiliation and belief which, as the district court held (R. 102), are peculiarly within petitioner's knowledge. It would seem that petitioner's silence concerning these matters could, under the view that this proceeding is civil, ground a hostile inference. Indeed, the District Court in *Nowak* drew precisely such a hostile inference, 133 F. Supp. 191, 196 (D. C. Mich.). It is thus plain that a root reason for the decision below is open to doubt and that a conflict with *Nowak* as to an important question in the administration of the denaturalization statute requires resolution.

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and professional witnesses with respect to issues in this proceeding concerning which they had testified before other tribunals, he was defeated at every turn—first by an order restraining the taking of any depositions (R. 129, 133), and then by Judge Byer's decision to vacate the notices of deposition served on these professional informers (R. 134, 159).

Finally, all of petitioner's additional interrogatories were denied (R. 169-170, 173), and with certain minor exceptions, all other attempts to use the machinery of pre-trial discovery set forth in the Rules of Civil Procedure were rejected (R. 160-162, 168, 169-170, 173, 178, 179).

The Sufficiency of the Affidavit

The affidavit which was attached to the amended complaint (R. 50) is indistinguishable from that which the Court has under review in *Nowak* v. *United States, supra.* The same considerations which led to the grant of certiorari in that case are equally applicable here. We add only the observation that the attempt to force petitioner to denaturalize himself out of his own mouth, *supra,* is not unrelated to our contention that the affidavit of good cause is not meaningful or informative. The government's effort to extract from petitioner detailed support for its shotgun charge, strikingly reproduces the evils which gave rise to the privilege against self-incrimination.*

The Jurisdictional Character of the Affidavit Requirement

1. In *Zucca, supra,* the Court held (at 99-100):

> "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant.

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* The extent to which the complaint against the lack of specific charges was historically coupled with a protest against self-accusation is discussed in Chafee, *The Blessings of Liberty* (1956), pp. 191-207. Thus Lilburn complained (*ibid.*, p. 200):

> "It seems they had no grounded matter against me for to write a bill, and therefore they went about to make me betray my own innocency, that so they might ground the bill upon my own words. * * *"

Equally illuminating is the following examination of William Bradford before the Pennsylvania Provincial Council (*ibid.*, p. 206):

> "Governour. * * * I desire to know from you, whether you did print the Charter or not, and who set you to work?
>
> "Bradford. Governour, it is an impracticable thing for any man to accuse himself; thou knows it very well.
>
> "Governour. Well, I shall not much press you to it, but if you were so ingenuous as to confess, it should go the better with you.
>
> "Bradford. Governour, I desire to know my accusers; I think it very hard to be put upon accusing myself.
>
> "Governour. Can you deny that you printed it? I do know you did print it, and by whose directions, and will prove it, and make you smart for it, too, since you are so stubborn. * * *
>
> "Bradford. * * * Let me know my accusers, and I shall know the better how to make my defence."

> Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a preliminary showing of good cause. Such a safeguard must not be lightly regarded. We believe that, not only in some cases but in all cases, the District Attorney must, as a prerequisite to the initiation of such proceedings, file an affidavit showing good cause."

2. In this case the affidavit of good cause was not filed until September 16, 1953, when the complaint was amended, some ten months after the commencement of the action herein (R. 44-54). Since the requirement that this affidavit be filed as a prerequisite to the initiation of the action was not complied with, the lower court did not have jurisdiction over the subject matter of the action.

3. The use of the word "prerequisite" by the Court can not be deemed casual or inadvertent. If the Court meant to hold that the affidavit is merely a "requisite", then it could be argued that its absence could be cured or waived. The Court, however, said that it was a "prerequisite". This word is defined by Webster as follows:

> "Required before; necessary as a preliminary to a proposed effect or an end; essential as a condition precedent."

In the words of the dictionary definition, the filing of the affidavit was required before the initiation of the proceeding, was necessary as a preliminary to the commencement of the proceeding and essential as a condition precedent.

4. The language of the statute ("*upon* affidavit showing good cause therefor") indicates that Congress had in mind a common form of notice of motion which would be

used in moving to vacate an order or judgment for fraud. The language plainly shows that, consistent with the serious nature and consequences of a denaturalization action, an affidavit of good cause is one of the requirements for the commencement of such an action.

5. The affidavit requirement of Section 338(a) finds an exact counterpart in Section 15 of the Naturalization Act of 1906, under which petitioner was naturalized. Prior to the Act of 1906, the denaturalization process was plagued by a series of basic evils, some of them jurisdictional in character:

(a) The standards for naturalization and denaturalization varied sharply—fraudulent naturalizations and denaturalizations were not uncommon in the State courts. See *Bindczyck* v. *Finucane*, 342 U. S. 76, 88; *In re Coleman*, 15 Blatchf. 406; 6 Fed. Cas. No. 2980 (C. C. N. Y.).

(b) The equity jurisdiction to revoke judgments of naturalization by motion or independent bill of review was awkward and artificial. See *United States* v. *Norsch*, 42 Fed. 417 (D. C. Mo.); *United States* v. *Gleason*, 78 Fed. 396 (D. C. N. Y.), affirmed 90 Fed. 778 (C. A. 2).

(c) "The extent of general Federal power to denaturalize was, prior to * * * [1906], a matter of considerable legal controvery.", S. Rep. 1515, 81st Cong., 2d Sess., p. 754.

(d) Citizens were subjected to hardship and injury in denaturalization proceedings because of irresponsible charges. See Letter of Attorney General Bonaparte, referred to in *Zucca*, at 96, fn. 10.

6. The intent of Congress in Section 15 of the Act of 1906 was not to patch up what had gone before but rather to create a new, exclusive jurisdiction in this area and to

define the conditions for its exercise. See *Bindczyck* and *Zucca, supra.* This intent would be defeated by failure to treat the affidavit as jurisdictional.

7. Obviously, the purpose of Congress in safeguarding citizens against the injury flowing from "the mere filing of a proceeding for denaturalization" would be entirely frustrated if, long after such unsupported proceedings were initiated, the complaint could be amended and the requisite affidavit of good cause attached to the complaint. As Judge Palmieri pointed out in *Zucca* (125 F. Supp. at 556-557); "* * * the protection afforded by the requirement of good cause would be seriously impaired if the defendant in a denaturalization action could not examine it and test its sufficiency by motion before trial." And the protective purpose of the notice provisions of Section 338(b) would be defeated if the complaint had to be filed on sixty days' notice, but not the affidavit.

8. As we have seen, *supra*, the district courts have differed in their views concerning the jurisdictional character of the affidavit requirement. Prior to *Zucca*, this Court in *Johannessen* v. *United States*, 225 U. S. 227, 242, and *Schneiderman* v. *United States*, 320 U. S. 118, 159, n. 54, seems to have assumed that the affidavit requirement is a prerequisite to the filing of the action.*

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* See, also, *Cohen* v. *United States*, 38 App. D. C. 123, 126; *United States* v. *Salomon*, 231 Fed. 928, 929, (C. A. 5); *Turlej* v. *United States*, 31 F. 2d 696, 697, (C. A. 8); *United States* v. *Hartmann*, 2 F. R. D. 477 (D. C. Pa.).

Compare *Maney* v. *United States*, 278 U. S. 17, which involved a petition for naturalization which had been filed without an accompanying certificate of arrival as required by the statute. The certificate was issued eleven days after the filing of the petition and mailed to the court ten days later. Upon the naturalization hearing two months thereafter, the district court, over the Government's objection, ordered the certificate filed and attached to the petition *nunc pro tunc* as of the date of the filing of the petition, and granted naturalization.

[Continued on page 18]

Conclusion

All of the three contentions which we make here are unified by the view that a denaturalization proceeding, because of the severity of its consequences, must be administered with meticulous regard for the rights of the citizen. Although *Zucca* held as much, a beachhead has already been opened here for its nullification.

The decision of the court below conflicts with the applicable decisions of this Court and raises important questions of Federal law requiring review by this Court. The reasons stated above, as well as the Court's responsibility for the administration of justice in the Federal courts require that this petition for writ of certiorari be granted.

Respectfully submitted,

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ARTHUR KINOY,
MARSHALL PERLIN,
342 Madison Avenue,
New York, New York,
Attorneys for Petitioner.

Upon these facts, Mr. Justice Holmes, speaking for an unanimous Court, reversed the action of the district court and held that the naturalization was improperly granted, stating (at 22-23):

> "It already has been decided that the filing of the certificate is an essential prerequisite to a valid order of naturalization, United States v. Ness [245 U. S. 319, 324-5] * * *. * * * If after the certificate came, the petition had been refiled * * * there would be a different case.
>
> "It is said that the district court had control of procedural matters and could cure formal defects. Very likely it had power to cure defective allegations but it had not power to supply facts. If, as we decide, the petitioner was required to file the Department of Labor's certificate at the same time that she filed her petition, the district court could not cure her failure to do so and enlarge its own powers by embodying in an order a fiction that the certificate was filed in time."

See, to the same effect, *In re Lorenzoni*, 42 F. 2d 297 (D. C. Pa.), and *Application of Barilla*, 29 F. Supp. 952 (D. C. N. Y.).

Appendix A

The Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of June, one thousand nine hundred and fifty-seven.

Present: HON. CHARLES E. CLARK,
Chief Judge.
HON. J. EDWARD LUMBARD,
HON. STERRY R. WATERMAN;
Circuit Judges.

UNITED STATES,
Plaintiff-Appellee,

v.

JAMES J. MATLES,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This Cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO,
Clerk.

Appendix B

The Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 250—October Term, 1956

(Argued January 10, 1957. Decided June 10, 1957)

Docket No. 24435

—o—

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

JAMES J. MATLES,
Defendant-Appellant.

—o—

Before:
CLARK, *Chief Judge*, and
LUMBARD and WATERMAN, *Circuit Judges*.

Appeal from the United States District Court for the Eastern District of New York, Matthew T. Abruzzo, Judge.

James J. Matles appeals from an order and sentence of three months' imprisonment for contempt in refusing to take the stand and to be sworn for his oral deposition in denaturalization proceedings against him. Affirmed.

See also D. C., E. D. N. Y., 115 F. Supp. 261, and 19 F. R. D. 319.

FRANK J. DONNER, of DONNER, KINOY & PERLIN, New York City (SAMUEL GRUBER, New York City, and ARTHUR KINOY and MARSHALL PERLIN, of DONNER, KINOY & PERLIN, New York City, on the brief), for defendant-appellant.

LEONARD P. MOORE, U. S. Atty., E. D. N. Y., Brooklyn, New York (CORNELIUS W. WICKERSHAM, JR., and HOWARD B. GLIEDMAN, Asst. U. S. Attys., Brooklyn, N. Y., on the brief), for plaintiff-appellee.

CLARK, *Chief Judge*:

This is an appeal from an order punishing a defendant in a denaturalization action who refused to obey a district court order directing him to be sworn to give his oral deposition before trial. Three issues are presented: (1) whether denaturalization proceedings are invalid if the affidavit of good cause required by 8 U. S. C. Sec. 1451(a) is filed subsequent to the complaint; (2) whether such affidavits must be based on personal knowledge of the affiant; (3) whether denaturalization proceedings are sufficiently criminal in their nature to permit the defendant to refuse to take the stand on grounds of self-crimination.

The action was instituted on December 16, 1952, to vacate, cancel, and set aside a certificate and order of naturalization granted the defendant in 1934; a verified complaint was filed, but no affidavit of good cause. On May 15, 1953, the defendant moved to dismiss the complaint for want of such an affidavit; and on September 16, 1953, by stipulation the Government filed an amended complaint accompanied by the affidavit of Reuben Speiser, verified on November 26, 1952. The affiant, an attorney in the Department of Justice, swore that he had access to the official records of the Immigration and Naturalization Service, from which it appeared that the defendant at the

time of his naturalization in 1934 had sworn that he believed in the form of government of the United States and was not associated with any organization that advocated revolution; that he would renounce forever all allegiance to any foreign state; and that he would bear true faith and allegiance to the United States. The records further showed—so it continued—that he was a member of the Communist Party from 1929 until the present time; that he and the Party promoted the political activities of the U. S. S. R. and advocated violent revolution, assassination of government officers, unlawful destruction of property, and sabotage. Finally it was alleged that the defendant at all times since 1929 bore allegiance to the Soviet Union and that his false statements were intentional and deliberate.

On September 23, 1953, the defendant's motion to dismiss the complaint was denied. D. C., E. D. N. Y., 115 F. Supp. 261. In the summer of 1956 the Government sought to take the defendant's deposition pursuant to F. R. C. P., rule 26. After the defendant's motion to vacate notice of his examination was denied he appeared for examination, but refused to be sworn. He was then taken before the district court, which directed that he be sworn; and he again refused to take the oath. An order to show cause why he should not be punished for contempt was then issued and he was found guilty of contempt and sentenced to three months' imprisonment, which was stayed for this appeal.

First. The requirement of an affidavit first came into our law in Sec. 15 of the Act of June 29, 1906, 34 Stat. 596, 601, and now appears without substantial change in 8 U. S. C. (Supp. III) Sec. 1451(a) thus: "It shall be the duty of the United States attorneys for the respective dis-

tricts, upon affidavit showing good cause therefor, to institute proceedings" for denaturalization, etc. The defendant claims that the affidavit of good cause is a jurisdictional prerequisite to a denaturalization proceeding and that a proceeding begun without one must be dismissed and cannot be cured by its subsequent filing. For this proposition he cites the recent Supreme Court decision in *United States* v. *Zucca*, 351 U. S. 91. There a denaturalization proceeding was commenced without filing an affidavit, and the district court ordered the complaint dismissed unless the Government filed the affidavit within 60 days. As this was not done the complaint was dismissed. D. C., S. D. N. Y., 125 F. Supp. 551. We affirmed the district court, 2 Cir., 221 F. 2d 805, and were in turn affirmed by the Supreme Court.

In the *Zucca* case the Government refused to amend its complaint and file the required affidavit when given the opportunity by the district court; instead it argued that filing is not a prerequisite to maintaining a denaturalization proceeding. In the present case the Government was again given an opportunity to file its affidavit belatedly, but this time it took advantage of the offer. The defendant's attorneys had stipulated: "Service of a copy of the amended complaint herein is admitted and the amended complaint is and shall be deemed to be substituted for the original complaint." To this complaint a copy of the previously executed affidavit was attached as an exhibit. The sole question on this branch of the case is whether the trial judge erred in allowing such delayed filing, and whether he should have insisted on the initiation of a new action by a new service of process. This issue is not settled in

the *Zucca* case and has been much mooted by district judges.[1]

Denaturalization proceedings are civil actions subject to the Federal Rules of Civil Procedure under which the initiation of the suit has dwindled in significance as a decisive event. For the freedom of amendment under, *e.g.*, F. R. 15(a) and (b) permits what is essentially a new suit to be instituted by a shift during the course of litigation from one claim to another.[2] So in the classic case of *Hackner* v. *Guaranty Trust Co. of New York*, 2 Cir., 117 F. 2d 95, certiorari denied 313 U. S. 559, we actually allowed the substitution of a new unrelated plaintiff for the one who could not show federal jurisdiction. See also *Bowles* v. *J. J. Schmitt & Co.*, 2 Cir., 170 F. 2d 617, 621. In this case, where the action was technically commenced in 1952, and the amended complaint and affidavit appeared in 1953, the

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[1] Prior to *United States* v. *Zucca*, 351 U. S. 91, the only two district judges who considered the argument now made by the defendant rejected it. Dawson, *J.*, in *United States* v. *Costello*, D. C. S. D. N. Y., 142 F. Supp. 325; Inch, *J.*, in *United States* v. *Lucchese*, D. C. E. D. N. Y., Civ. No. 13052, Nov. 28, 1955. After the Supreme Court's opinion was published two district judges accepted defendant's argument, Inch, *J.*, in *United States* v. *Lucchese*, *supra*, Oct. 15, 1956, and now pending on appeal; Harrison, *J.*, in *United States* v. *Diamond*, D. C. S. D. Cal., Civ. No. 17412-BH, July 26, 1956, while six district judges rejected it, Dimock, *J.*, in *United States* v. *Costello*, D. C. S. D. N. Y., 142 F. Supp. 290; Carter, *J.*, in *United States* v. *Celia Feller Miller*, D. C. S. D. Cal., May 31, 1956; Edelstein, *J.*, in *United States* v. *Pellegrino*, D. C. S. D. N. Y., Civ. No. 93-366, Oct. 11, 1956; Koscinski, *J.*, in *United States* v. *Kiros*, D. C. E. D. Mich., 149 F. Supp. 730; Anderson, *J.*, in *United States* v. *Hyman Kaplan*, D. C. Conn., Civ. No. 3509, May 4, 1956; and Abruzzo, *J.*, in the present case.

[2] Substantive law may occasionally attach weight to the commencement of suit, as in the application of statutes of limitations; but here, too, state law governing in the federal courts may make some other time, *e. g.*, that of service of process, more vital. See *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U. S. 530.

action never got under way in any real sense, even for the taking of depositions, until the summer of 1956—three years after the affidavit was formally filed. We see no gain to anyone in requiring a departure from the Federal Rules here to require a new service of process by the marshal to allow the court and parties to look at this affidavit which has been before them so long.

Several references—actually five in number—in *United States* v. *Zucca*, *supra*, 351 U. S. 91, to the affidavit as a prerequisite to "maintaining" a denaturalization suit are quite in accord with this analysis. Only at the very end of the opinion is there a single sentence calling the affidavit a prerequisite to the "initiation" of such proceedings. We cannot believe this limited variation of expression was intended to nullify the effect of the several earlier precise statements and to commit the Court to so meaningless a formality as a second service of process here. It is to be noted that the lower court opinion here affirmed was one dismissing only when the Government failed to obey the command that it file the affidavit within 60 days.

Second. Defendant attacks the sufficiency of the affidavit as filed by the Department attorney. As noted above, this set forth at considerable length the grounds of attack the Government planned upon defendant's naturalization and referred to government records to prove them. Thus it gave the defendant notice of the nature of the case he must meet. But his substantial contention is that the affidavit must be made by someone with knowledge. This means obviously a disclosure of evidence and—to judge by the trial tactics in the criminal prosecutions—of the informers who must be relied on for proof of Party membership. There is nothing in the wording of the statute to suggest so extensive a requirement. If Congress in 1906 had desired the Government thus to prove its case in advance, it would seem that it would have so said, and not

contented itself in calling for a good cause affidavit of a nature similar to a citizen's complaint as a basis for a criminal information. True, the Attorney General and the immigration officers have wide powers of investigation under Sec. 235(a) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 198, and see *United States* v. *Minker*, 350 U. S. 179. But it does not seem normal for the Government to show its details of proof in a preliminary good cause affidavit, and we do not see a sound purpose to cause us to read such a requirement into the modest statutory provisions. We are quite in favor of enforcing the statutory provisions to insure good faith in these prosecutions with such drastic consequences; indeed, it was this court's decision in *United States* v. *Zucca, supra*, 2 Cir., 221 F. 2d 805, so holding, which was affirmed by the Supreme Court. But we fail to see how disclosure of the informer's name at this time will aid the statutory purpose as we conceive it.

Nor do we see anything in the *Zucca* opinion which states a different requirement. Of course it is true that the vigorous dissent tries naturally to put the strongest interpretation on what the majority is requiring; but in so doing, it has to quote and rely on the *respondent's* interpretation, 351 U. S. 91, 102. The only approach in the majority opinion is the observation quite justified in the modern law of pleading, 351 U. S. 91, 98, 99: "The complaint, under modern practice, is required merely to allege ultimate facts while the affidavit must set forth evidentiary matters showing good cause for cancellation of citizenship." Actually the *Zucca* complaint did consist of allegations of ultimate fact in pleading form. The affidavit here, though it did deal with the same subject matter, referred to the evidence in its records of concealed Communist Party membership, although it gave no names of witnesses. That this is sufficient has been the interpretation of the cases since the

Zucca decision, *Nowak* v. *United States*, 6 Cir., 238 F. 2d 282, certiorari granted 353 U. S. 922; *United States* v. *Costello*, D. C. S. D. N. Y., 142 F. Supp. 290; *United States* v. *Chandler*, D. C. Md., 142 F. Supp. 557; *United States* v. *Kiros*, D. C. E. D. Mich., 149 F. Supp. 730, as it was prior thereto, as in, *e.g.*, *Maney* v. *United States*, 278 U. S. 17; *Schneiderman* v. *United States*, 320 U. S. 118; *Baumgartner* v. *United States*, 322 U. S. 665; *U. S. ex rel. Harrington* v. *Schlotfeldt*, 7 Cir., 136 F. 2d 935, certiorari denied *Krause* v. *United States*, 327 U. S. 781.

Third. We have concluded that denaturalization proceedings are not sufficiently criminal in their [illegible]re to entitle a defendant to refuse to take the stand. My brothers are persuaded to this view by cases labeling denaturalization "civil" for slightly different purposes, *e.g.*, *Schneiderman* v. *United States*, *supra*, 320 U. S. 118, 160; *United States* v. *Jerome*, D. C. S. D. N. Y., 16 F. R. D. 137; by the theory that the action is a rescission of a status obtained by fraud, *e.g.*, *Luria* v. *United States*, 231 U. S. 9, 27-28; *United States* v. *Kusche*, D. C. S. D. Cal., 56 F. Supp. 201, 225; and by the fact that little prejudice attaches to the defendant's refusal to answer specific questions because denaturalization cases are tried by the court, and not to juries. See 8 Wigmore Sec. 2268 (3d Ed. 1940). I have had more doubts because this type of case has been distinguished from ordinary civil actions for certain purposes, *e.g.*, *Schneiderman* v. *United States*, *supra*, 320 U. S. 118, 125; *Baumgartner* v. *United States*, *supra*, 322 U. S. 665, 670; *United States* v. *Minker*, *supra*, 350 U. S. 179, 197 (concurring opinion of Justice Douglas); because the issues in this case are so close to those involved in a prosecution under the Smith Act, 18 U. S. C. Sec. 2385, or the Internal Security Act, 50 U. S. C. Secs. 843, 855, that identical treat-

ment of the constitutional issue here with what would be accorded in such a prosecution seems not unreasonable;[3] and because one who takes the stand must play a dangerous game of properly timing his claims of privilege to avoid both contempt and waiver. My brothers pertinently observe, however, that deportation, which is even more severe in its consequence, has been held to be a civil action. *Bilokumsky* v. *Tod*, 263 U. S. 149; *Harisiades* v. *United States*, 342 U. S. 580, 594.

This important issue must of course await final settlement by the Supreme Court. Meanwhile, in view of the state of the authorities, I am content to join my brothers in voting for affirmance.

Affirmed.

LUMBARD, *Circuit Judge* (concurring):

This issue of whether Matles may refuse to be sworn as a witness is of such importance in the administration of justice in all civil cases that I take this occasion to make my own position clear. On reason and precedent, Matles, like any other party or witness in a civil suit, and not under indictment on similar charges, may not refuse to be sworn as a witness.

It is undisputed that denaturalization is a civil proceeding, *Schneiderman* v. *United States*, 320 U. S. 118, 160 (1943), governed by the Federal Rules of Civil Procedure, see Chief Judge Clark's opinion, page 1631. It is also clear that Rule 26(a) requires a party in such a case to submit to an examination before trial. *United States* v. *Jerome*, 16 F. R. D. 137 (S. D. N. Y. 1954).

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[3] Matles is here charged with present active membership in the Communist Party; promoting the public policy of the U. S. S. R.; and personally advocating political assassination, revolution, and sabotage.

Rule 1 of the Civil Rules provides that "these rules govern the procedure in the United States District Courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81." From an examination of Rule 81, it is apparent that Congress and the Supreme Court have already considered the extent to which denaturalization proceedings are not to be governed by the Civil Rules and have provided for only two exceptions which are specifically set forth in Rule 81(f)(6) as follows: "The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of October 14, 1950, c. 876, Sec. 338 (54 Stat. 1158), U. S. C. Title 8, Sec. 738, remain in effect." This specific reference indicates not only that denaturalization is a civil action within the scope of Rule 1 of the Civil Rules but also that the exceptions noted in Rule 81(f)(6) are the only exceptions intended.[4] *United States* v. *Jerome, supra.*

In any event, this defendant, not being under indictment on charges similar to those at issue in this denaturalization proceeding, is not in a position similar to that of an accused in a criminal prosecution. While it cannot be said that the denaturalization defendant faces no dangers, they are different in nature and degree from those faced by an accused, and are such as must be faced by any defendant in a civil suit if our methods of seeking and finding the facts are to function fairly and effectively.

The danger underlying the accused's right not to take the stand and to be sworn is that a refusal by him to answer might emphasize in a particularly prejudicial way that the

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[4] The only other exception peculiar to denaturalization is that the complaint may not be amended to accord with the proof, despite Civil Rule 15(b). See *Schneiderman* v. *United States*, 320 U. S. 118, 160 (1943). But the existence of Rule 15(b) was evidently not brought to the attention of the Court, for it was not mentioned in the opinion by Justice Murphy.

accused considers certain questions incriminatory and the jury may consider his refusals to answer as the equivalent of damaging answers. See 8 Wigmore, Sec. 2268 (3d ed. 1940); *United States* v. *Scully*, 225 F. 2d 113, 115-16 (2 Cir. 1955), cert. den. 350 U. S. 897 (1955); *United States* v. *Grunewald*, 25 U. S. L. W. 4322, 4331 (May 27, 1957).

But no such prejudice attaches to the refusal to answer questions at an examination before trial in a civil case. The fact that denaturalization cases are tried by the court and not to juries, *Luria* v. *United States*, 231 U. S. 9, 27 (1913), only serves to emphasize the point.

Moreover, as in any civil action, the denaturalization defendant has notice in advance regarding the issue and the assistance of counsel at every step of the way, for every question. He can claim his privilege as to each alleged incriminatory question as it is asked. This is all the protection which is necessary.

I do not believe that the possibility of inadvertent waiver, which is reduced to a minimum where counsel is present, justifies the extension of the privilege in violation of the rights of the other party and in derogation of the fact-finding policy of the Federal Rules of Civil Procedure. No court has yet accepted or even suggested such a doctrine. Even in grand jury proceedings where the dangers of such waiver are far greater because the witness does not have the assistance of counsel in the grand jury room, the witness must still be sworn even though he might be indicted for the matters under investigation. See *O'Donnell* v. *United States*, 40 F. 2d 201, 205 (2 Cir. 1930); *Mulloney* v. *United States*, 79 F. 2d 566, 578-9 (1 Cir 1935); *cf. United States* v. *Grunewald*, *supra*, 25 U. S. L. W. at 4331; see also *Scully* v. *United States*, *supra*, which holds that the possibility that the witness may later be indicted does not require that he be warned of his Fifth Amendment rights when called as a witness before a grand jury.

Furthermore, fear of inadvertent waiver would justify a refusal to be sworn in any civil case where the main charge could also be ground for criminal prosecution, *e.g.*, a suit in negligence where the charge is reckless or drunken driving or a suit for conversion or embezzlement. In each case it could be argued that most questions could be incriminatory and that there is a danger that a party may waive his privilege and be forced to answer a series of incriminatory questions. I doubt that anyone would be willing to allow such a frustration of the fact-finding process in these other contexts, but the logic of such reasoning is not limited to denaturalization—it would extend to any civil action where the main charges could be the basis of a criminal prosecution. I find it hard to believe that this far-reaching result is at all necessary, especially in view of the defendant's existing protection.

Finally, we cannot say in advance of the examination whether any non-incriminatory questions may be asked. Rule 26(b) of the Federal Rules of Civil Procedure was designed to permit broad and searching examination of all matters which would assist a party in discovering evidence. Thus Rule 26(b) provides:

> "Unless otherwise ordered by the court as provided by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence."

This language is clearly designed to be broad enough to cover almost anything that will help the examining party to discover any leads to evidence. In practice the district court is not asked to rule on the availability of the privilege to refuse to answer until a number of questions have been asked and refused. The district court is thus in a position to determine the incriminatory nature of the question or questions in the context of the whole case and the nature of the information sought to be elicited. Until that moment, it cannot be known which of the many possible questions will require answers which may be incriminatory. Thus it seems to me that in all civil cases as long as it is possible that one question may be answered, the spirit of the Federal Rules requires that the witness be sworn and the district court must make the determination whether particular questions must be answered, and not the party himself. See *United States* v. *Jerome*, *supra*.

Without the power to seek and find the facts through the swearing and questioning of witnesses, the administration of justice would be seriously obstructed. This most fundamental power, as recognized and developed through our Federal Rules of Civil Procedure, should not be diminished or frustrated unless and until it is clear to the district court that the answer to a particular question may incriminate the witness. Clearly, we do not reach that point when the party is called upon to take the oath; we reach it only when the court can judge the possible effect of a particular question.

Appendix C

The Opinion of the Court Below in United States v. Lucchese

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 274—October Term, 1956.

(Argued March 15, 1957 Decided June 17, 1957.)

Docket No. 24424

—o—

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

GAETANO LUCCHESE, also known as THOMAS LUCKESE, also known as THOMAS LUCASE, also known as THOMAS ARRA, also known as THOMAS LUCHESE,

Defendant-Appellee.

—o—

Before:

HINCKS, STEWART and LUMBARD,

Circuit Judges.

In an action by the government to cancel the defendant's naturalization for fraud and misrepresentation, under § 338(a) of the Nationality Act of 1940, 54 Stat. 1158, later amended by 66 Stat. 239 (1952), 8 U. S. C. A. § 1451(a), the District Court for the Eastern District of New York, Inch, *J.*, dismissed the complaint for failure to file an affidavit of good cause at the time the action was instituted. Reversed.

Appendix C—The Opinion of the Court Below in United States v. Lucchese

LEONARD P. MOORE, United States Attorney, Eastern District of New York, Brooklyn, N. Y. (Elliot S. Greenspan, Assistant United States Attorney, of counsel), *for plaintiff-appellant.*

RICHARD J. BURKE, New York, N. Y. (Myron L. Shapiro, of counsel), *for defendant-appellee.*

LUMBARD, *Circuit Judge*:

This is a denaturalization action brought under § 338(a) of the Nationality Act of 1940, 54 Stat. 1158,[1] later amended by 66 Stat. 239 (1952), 8 U. S. C. A. § 1451(a), in which the government appeals from an order dismissing its complaint for failure to file an affidavit of good cause at the commencement of the proceeding. The District Court held that filing the affidavit after the complaint did not comply with the statutory requirement. On the authority of *United States* v. *Matles*, decided June 10, 1957, we reverse.

Lucchese was naturalized in 1943. Prior to this, in 1941, he filed an application for a Certificate of Arrival and Preliminary Form for Petition of Naturalization, in which he admitted to one conviction for theft of an automobile in 1921 and swore that other than this he had never been

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[1] Nationality Act of 1940:

Sec. 338(a). Revocation of Naturalization.

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 701 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured. [8 U. S. C., 1940 Ed., Sec. 738(a).]

arrested or charged with violation of the law. He also swore to this on an Alien Registration Form on December 16, 1940 and reiterated it before a Naturalization Examiner at a hearing on November 21, 1941, preliminary to the filing of the naturalization petition.

On the Alien Registration Form, the application, and at the hearing, he also swore that he had never been known by any name other than either Gaetano Lucchese or Thomas Lucchese.

On November 17, 1952 the Government filed a verified complaint to denaturalize Lucchese under § 338(a) of the Nationality Act of 1940. In the complaint it was alleged (1) that Lucchese's statements about his criminal record were false for he had been arrested not once but many times, and the complaint listed the dates, places and charges of five arrests in addition to the one he had admitted to; (2) that he had lied in testifying about the names he had used, for he had also used the name "Thomas Arra" when arrested in 1927 for receiving stolen goods; (3) that all these misrepresentations were for the purpose of fraudulently procuring citizenship; and (4) that these misrepresentations indicated that he was not a person of good moral character during the period required by law. The details of the complaint are material to this appeal, and we therefore set them out in the margin.[2]

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[2]

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"3. That on the 21st day of November, 1941, the said defendant filed his petition for naturalization #51652 in the District Court of the United States for the District of New Jersey, Newark, New Jersey.

4. That on the 25th day of January, 1943, the said United States District Court for the District of New Jersey, relying on the truth and good faith of the representations made by the said defendant in his petition for naturalization, entered its order admitting him to citizenship in the United States and thereupon Certificate of Naturalization, #5701024, was issued to him on January 30, 1943 by (2) the Clerk of said Court.

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No affidavit of good cause was filed with the complaint on November 17, 1952. However, such an affidavit was

5. That the said defendant, prior to November 21, 1941, filed with the United States Immigration and Naturalization Service an Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization in which he certified in writing, in answer to the printed question whether he had ever been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation, that at age of 20 he had been arrested and convicted for theft of an automobile and sentenced to three years and nine months.

6. That the said defendant, on November 21, 1941, during an examination preliminary to the filing of the aforesaid petition for naturalization did testify under oath before a United States Naturalization Examiner that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, Riverhead, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of which he served two years and nine months.

7. That the said defendant, on November 21, 1941, during a hearing subsequent to the filing of the petition for naturalization did testify under oath before a United States Naturalization Examiner, who was duly designated by said Court to conduct such hearing, that he had never been arrested or charged with violation of any law of the United States or State or any city ordinance or traffic regulation except that in January 1921 at the age of 20 he had been convicted in the County Court of Suffolk County, Riverhead, New York, of larceny of an automobile for which he was sentenced to imprisonment of three years and nine months of, which term he served two years and nine months.

8. That the aforesaid representations made by the said defendant as to his criminal record were false and fraudulent.

9. That in fact and in truth, in addition to the arrest admitted by the defendant as aforesaid, he had prior to November 21, 1941 been (3) arrested on five other occasions as follows:

apparently drawn up on that date, for the affidavit ultimately filed on November 23, 1955 was dated the same day

on or about August 30, 1927 in New York, N. Y. the defendant was arrested under the name of Thomas Arra on a charge of criminally receiving stolen goods;

on or about July 18, 1928 in New York, N. Y. the defendant was arrested under the name of Thomas Lucase on a charge of homicide (gun);

on or about September 8, 1930 in New York, N. Y. the defendant was arrested under the name of Thomas Luckese on a charge of homicide;

on or about July 4, 1931 the defendant was fingerprinted by the Cleveland, Ohio, Police Department for investigation;

on or about November 18, 1935 the defendant was arrested in New York, N. Y. under the name of Thomas Lucase on a charge of vagrancy.

10. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

11. That in the Application for a Certificate of Arrival and Preliminary Form for Petition for Naturalization filed by the said defendant with the United States Immigration and Naturalization Service prior to November 21, 1941, he certified in writing that his full true name and any other name which had been used were Gaetano Lucchese, also known as Thomas Lucchese.

12. That the said defendant on November 21, 1941 during the aforementioned examination preliminary to the filing for the petition for naturalization testified under oath before a United States Naturalization Examiner that he had never used or been known by any other name than Gaetano Lucchese and Thomas Lucchese.

(4) 13. That the said defendant on November 21, 1941 during the aforementioned hearing conducted subsequent to the filing of the petition for naturalization did testify under oath before

as the verified complaint and referred to it as "the attached complaint." This affidavit, sworn to by Ralph Farb,

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a United States Naturalization Examiner who was duly designated by said Court to conduct such a hearing, that he had never used or been known by any other name other than Gaetano Lucchese and Thomas Lucchese.

14. That the aforesaid representations made by the said defendant as to his name were false and fraudulent.

15. That in fact and in truth in addition to the names Gaetano Lucchese and Thomas Lucchese the defendant had used the name Thomas Arra when arrested in New York, N. Y. on or about August 30, 1927, for criminally receiving stolen goods.

16. That the aforesaid false and fraudulent representations were made by the defendant and the aforesaid testimony was given by him for the purpose of and in order to deceive the Immigration and Naturalization Service, Department of Justice, United States of America, as well as the United States District Court in order to obtain his naturalization in violation of the law.

17. That on December 16, 1940 the said defendant executed an Alien Registration Form pursuant to the Alien Registration Act of 1940 and regulations made thereunder in which he represented under oath that

a. his name was Gaetano Lucchese and that he was also known by the name of Thomas Lucchese

b. he had been arrested for larceny in 1920 at New York City, N. Y. for which he was sentenced to three years and nine months.

18. That the aforesaid representations were false and fraudulent in that

a. the defendant had in truth and in fact used the name of Thomas Arra when arrested in New York City in 1927 for criminally receiving stolen goods.

b. the defendant had been arrested five additional times as more fully stated in paragraph 9 above.

(5) 19. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16,

an Attorney for the Immigration and Naturalization Service, stated:

1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

20. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented under oath on December 16, 1940 in an Alien Registration Form required under the provisions of the Alien Registration Act of 1940 and regulations made thereunder that his only arrest was in New York City in 1920 for larceny whereas, in fact, he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

21. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that the only names by which he had been known were Gaetano Lucchese and Thomas Lucchese whereas, in fact, he had also been known as Thomas Arra.

22. That the defendant was not a person of good moral character during the period required by law inasmuch as he had falsely and fraudulently represented in the course of his naturalization proceedings both in the preliminary written application filed before November 21, 1941 and in his sworn testimony of November 21, 1941 before various United States Naturalization Examiners that his only arrest was at the age of 20 in the County Court, Riverhead, Long Island, New York when he was convicted for theft of an automobile, whereas, in fact, he had been arrested on five other occasions as more particularly set forth in paragraph 9 above.

(6) 23. That the naturalization of the said defendant was illegally and fraudulently procured.

24. That good cause exists for the institution of a suit under Section 338 of the Nationality Act of 1940 (8 U. S. C. 738) to set aside and cancel naturalization of the said Gaetano Lucchese as having been illegally and fraudulently procured."

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> . . . . [A]s more fully appears from the attached complaint of the United States against Gaetano Lucchese, etc., which complaint seeks revocation of defendant's naturalization, good cause exists for revocation of naturalization for the following reasons:
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> 1. The defendant fraudulently procured naturalization in that he misrepresented facts as to his name and identity and also as to his record of arrests.
>
> 2. The defendant's naturalization was illegally procured in that at the time of admission to citizenship he had not been for the period required by law, a person of good moral character, having both in naturalization proceedings and in alien registration proceedings made false and fraudulent representations under oath."

On October 27, 1955 Lucchese moved to dismiss the complaint for failure to file the affidavit. The government, on November 23, 1955, then filed the affidavit which was dated November 17, 1952, and Judge Inch denied the motion on the ground that the affidavit requirement had been satisfied.

On March 26, 1956 Lucchese again moved to dismiss on the grounds that (1) the affidavit failed to set forth the facts showing good cause for the institution of the proceeding; (2) the affidavit itself showed that the action was not based on the affidavit; (3) the affidavit was filed after the complaint. Judge Inch again denied the motion.

After the decision in *United States* v. *Zucca*, 351 U. S. 91 (April 30, 1956), Lucchese moved to reargue his motions on the ground that the decision in *Zucca* supported each of the three grounds for dismissal that he had previously presented. Judge Inch held that *Zucca* required the affidavit to be filed with the complaint and, reversing his prior rulings, dismissed the complaint.

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Whether the affidavit must be filed with the complaint was one of the issues before this court in *United States* v. *Matles, supra*, in which it was held that the affidavit can be filed after the complaint and that *United States* v. *Zucca, supra*, does not require otherwise. Hence, on the authority of *United States* v. *Matles*, we reject the defendant's reading of *Zucca*.

For the reasons stated in the *Matles* decision, we also reject defendant's contention that the affidavit of good cause must be made by someone with personal knowledge of the facts sworn to. See also *United States* v. *Costello*, 142 F. Supp. 290 (S. D. N. Y. 1956).

Lucchese further contends that the good cause affidavit is inadequate because it does not contain evidentiary facts in support of the complaint but merely the conclusory statements that defendant fraudulently procured citizenship by misrepresentations as to his name, identity and criminal record, and that because of these misrepresentations he did not satisfy the good moral character requirements.

Examination of the affidavit discloses that it contained more than these conclusory statements which, by themselves, would certainly be insufficient. These conclusions were prefaced by an incorporation by reference of the complaint, in these words:

> "* * * as more fully appears from the attached complaint of the United States v. Gaetano Lucchese, etc., which complaint seeks revocation of defendant's naturalization, good cause exists for revocation of naturalization. * * *"

As noted, the complaint contained detailed allegations setting forth many evidentiary matters,[3] and, if incorporated, would bring the affidavit up to the standard which *Zucca* seems to have established, 351 U. S. at 99.

[3] See note *2 supra*.

Lucchese claims, however, that this attempted incorporation by reference is ineffective, for no complaint was attached to the affidavit and he therefore could not know that the complaint herein was intended. This contention is frivolous. The record discloses only one denaturalization complaint outstanding against Lucchese, and that was dated the same day as the affidavit, although as we have stated, the affidavit was not filed until much later. It is inconceivable that Lucchese or anyone else who had read and had possession of the original complaint could be at all uncertain as to which complaint was referred to.

Lucchese also seems to contend that under § 338(a) the action must be based "*upon* [an] affidavit showing good cause therefor," and that this action was not, but upon records in the Immigration and Naturalization Service and the Federal Bureau of Investigation. He seems to interpret the word "upon" to mean that the affidavit must be the source of the information on which the government bases its action. The affidavit must therefore be in existence prior to the initiation of the action and, he contends, that was not true here, for whatever complaint was referred to in this affidavit the latter was drawn up after that complaint.

In support of his argument that the action was not based upon the affidavit herein, Lucchese points to these factors: (1) verification in the complaint does not refer to the affidavit as the source of information but rather to "correspondence, papers and reports"; (2) the affidavit does not itself state the evidentiary matter but refers to the complaint, and this, he contends, necessarily implies that the affidavit was drawn up after the complaint and that the action could not have been based on the affidavit.

While agreeing with Lucchese's interpretation of the statutory use of "upon," see *United States* v. *Zucca*, 351 U. S. at 100, we do not agree that the statute was not complied with.

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As to the first point, "correspondence, papers and reports" are words sufficiently broad and comprehensive to include an affidavit. Secondly, we are not persuaded that the affidavit was not drawn up until after the complaint was filed, simply because the affidavit incorporates the allegations of the complaint. The use of this shorthand device indicates only that the two documents were drawn up at about the same time. It does not imply that the affidavit was drawn up after the complaint was filed. On the contrary, it would seem that here the affidavit and complaint were drawn up at about the same time, and were completed by November 17, 1952 when the complaint was filed. Apparently it was not the practice to file the affidavit with the complaint and so the affidavit was kept in the files of the United States Attorney. But regardless of whether the affidavit was filed with the complaint or later, see *United States* v. *Matles, supra*, suit was commenced only after an affidavit of good cause had been executed, and that constitutes full compliance with the statutory requirement of § 338(a) that the suit be based upon the affidavit.

In § 338(a) Congress sought to guard against the misadventure that suits with such serious possible consequences to naturalized citizens might be commenced without a careful preliminary study and a finding simultaneous with the filing of the suit that there was good cause for its commencement. In this case the date and contents of the affidavit show that the defendant has enjoyed the protection which Congress intended he should have. The motion to dismiss the complaint should have been denied.

Accordingly we reverse the order of the District Court.

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STEWART, *Circuit Judge*, concurring:

In view of *United States* v. *Zucca*, 351 U. S. 91, the district court held that a denaturalization proceeding could not be maintained when the affidavit of good cause was filed subsequent to the complaint. My independent view is that the district court was correct.

The concluding words of the prevailing opinion in *Zucca* seem to me unambiguous: "The mere filing of a proceeding for denaturalization results in serious consequences to a defendant. Even if his citizenship is not cancelled, his reputation is tarnished and his standing in the community damaged. Congress recognized this danger and provided that a person, once admitted to American citizenship, should not be subject to legal proceedings to defend his citizenship without a *preliminary showing* of good cause. Such a safeguard must not be lightly regarded. We believe that, not only in some cases but in all cases, the District Attorney must, as a *prerequisite to the initiation* of such proceedings, file an affidavit showing good cause." [Emphasis added.] 351 U. S. 99-100.

I agree with my brethren, however, that the law of this circuit is now otherwise. For that reason alone I concur. While a distinction could be made between this case and *United States* v. *Matles*, — F. (2d) —, June 10, 1957, in that an amended complaint was filed there, the basic issue is substantially the same in both cases.